

POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

COPPER DEVELOPMENT ASSOCIATION
INC., and THE INTERNATIONAL COPPER
ASSOCIATION, LTD.,

Appellants,

v.

WASHINGTON STATE DEPARTMENT OF
ECOLOGY,

Respondent.

No.

NOTICE OF APPEAL

The Copper Development Association Inc., ("CDA") and the International Copper Association, Ltd., ("ICA") representing members who are subject to the action challenged herein ("collectively, Appellants"), seek review by the Pollution Control Hearings Board ("Board") of the Industrial Stormwater General Permit ("ISGP") issued by the Washington State Department of Ecology ("Ecology") on October 21, 2009, with an effective date of January 1, 2010.

1. Name and Address of Appellants and Representatives

Appellants in this matter are:

The Copper Development Association Inc.
260 Madison Avenue
New York, NY 10016
(585) 545-4805

The International Copper Association, Ltd.
260 Madison Avenue
New York, NY 10016
(212) 251-7257

NOTICE OF APPEAL

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1 Appellants are represented by:

2
3 Stoel Rives LLP
4 600 University Street, Suite 3600
5 Seattle, WA 98101
(206) 386-7581
(206) 386-7500

6 **2. Name of the Other Party**

7 Respondent is the Washington State Department of Ecology, an agency of the State of
8 Washington that issued the ISGP described in this Notice of Appeal.

9 **3. Action Appealed**

10 The action appealed from is the final ISGP issued on October 21, 2009 and effective on
11 January 1, 2010. True and correct copies of the ISGP and its accompanying Fact Sheet are
12 attached to this Notice of Appeal as Exhibit A.

13 **4. Statement of Facts**

14 Ecology issued a draft ISGP in June 2009 proposing to establish stringent pollutant
15 benchmarks, including a copper benchmark at 14 µg/L, (micrograms per liter) for Western
16 Washington and 32 µg/L (Eastern Washington). Ecology proposed such stringent benchmarks
17 claiming they were necessary to protect salmon and other aquatic biota. Benchmarks were
18 established by Ecology as "indicator values" rather than enforceable effluent limits. Pollutant
19 concentrations below the benchmark are considered unlikely to cause a water quality violation,
20 while concentration levels greater than the benchmark may cause a water quality violation.

21 The ISGP requires permittees to quarterly sample their stormwater discharges.
22 Monitoring results that do not meet the established benchmarks trigger expensive adaptive
23 management practices intended to achieve monitoring results at or below the benchmarks. These
24 adaptive management requirements are progressively tiered to the number of times in a given
25 year a permittee's sampling reveals pollutants in excess of the benchmarks. Expensive treatment
26

1 best management practices (“BMPs”) are required whenever a permittee exceeds a benchmark
2 three times in one calendar year. According to Ecology’s Boatyard General Permit, the average
3 cost of treatment BMPs for copper at a facility is expected to exceed \$255,000 per acre.

4 Ecology sought public comments on the draft permit on June 3, 2009 and received
5 comments from more than 100 affected stakeholders, including Appellant CDA. CDA
6 commented that the proposed copper benchmark was unnecessarily stringent to protect water
7 quality, and economically unreasonable. CDA explained that the study on which the copper
8 benchmarks were derived (Herrera 2009) provided an insufficient scientific and technical basis
9 on which to support the benchmark by ignoring a substantial body of peer-reviewed scientific
10 literature. CDA further urged Ecology to incorporate one or more of a suite of readily available
11 and widely accepted tools to consider dilution factors and site-specific variables (including
12 mitigating chemical and physical factors) that more accurately reflect the real-world conditions
13 impacting the toxicity of stormwater discharges on affected receiving waters and their aquatic
14 biota.


15 The final ISGP ignored CDA’s comments and maintains the stringent copper benchmarks
16 at those originally proposed: 14 µg/L (western Washington) and 32 µg/L (Eastern Washington).
17 These benchmarks are now applicable to 1200 individual sources, the vast majority of whom are
18 likely to exceed the copper benchmarks and require the employment of expensive treatment
19 BMPs.

20 While Ecology provided an option for permittees to seek a waiver of treatment BMPs if
21 they are either infeasible for a given source or otherwise not necessary to attain water quality
22 standards, the waiver is unlikely to be useful to a permittee because it is unlikely to be granted by
23 Ecology in other than exceptional situations. Indeed, any proposed decision by Ecology to grant
24 such a waiver is subject to public notice and comment and formal permit modification
25 requirements, including further appeal by any interested person objecting to such modification.
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6. Relief Sought

DATED: November 16, 2009.


Beth Ginsberg, WSB No. 18523
Attorneys for Appellants
Copper Development Association Inc., and
The International Copper Association, Ltd.,